No. 2773

United States

Circuit Court of Appeals

For the Ninth Circuit.

MAINE NORTHWESTERN DEVELOPMENT COMPANY, a Corporation,

Appellant,

vs.

NORTHWESTERN COMMERCIAL COMPANY, a Corporation,

Appellee.

REPLY BRIEF OF APPELLANT.

WILLIAM H. GORHAM,
Attorney for Appellant.

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Reply Brief of Appellant.

While the exhaustive Statement of Case by appellant in its opening brief is not complained of or criticized by appellee in its answering brief, appellee attempts there to re-state the case, which re-statement, because of its inaccuracies, appellant cannot let go unchallenged, but will refer to those inaccuracies in the order in which they occur in appellee's brief, as follows:

1. At page 3, lines 5–8, appellee's brief, it states that

> "It had been agreed by the owners of the mining property that they would sell the property to the company for $245,000 cash";

2. At page 3, lines 14 and 17, appellee's brief, it states:

> "At any rate it was agreed between all the parties that the new company to be organized would buy the mining properties and water claims for a consideration of $245,000 (Record, pages 127–28)."

Both of these statements are incorrect and not supported by the record. The sum of $245,000 was the price agreed upon as between McConnell, representing the owners of the property, and French (Record, p. 129).

But those owners never had any business relations with the appellant company.

3. At page 3, lines 19 to 25, appellee's brief, it states that it appears from Rosene's testimony that

> "He had paid French $20,000 either for an interest in the mining claims or for a share in the profits which French was making by negotiating the sale. (Record, p. 162.)"

The latter part of this statement as to a share in the profits is purely gratuitous on appellee's part, as there is nothing in the record at page 162, or elsewhere, from which the slightest inference can be drawn that Rosene ever had any share in whatever profit French made by negotiating the sale.

4. At page 4, lines 15 to 25, appellee's brief, it states that McConnell refused to accept the obligations of the proposed corporation for $245,000; and that Rosene took title from the owners and in turn conveyed the same to the company "because of the insistence of McConnell that he must have Rosene's personal obligation for the $245,000 (page 129)."

Both of these statements are incorrect. There is no evidence that McConnell refused to accept the proposed company's obligations or that he was insistent upon having Rosene's personal obligation for $245,000. The record shows that McConnell did not

want to take anything but $245,000 cash (page 129, line 29), and that in addition to the payment of $20,000 to French on February 7, 1906 (on account of the properties), on March 15, 1906, Rosene paid McConnell $93,000 (Record, p. 163), and gave him his own personal note for $100,000 (Record, p. 130).

5. At page 6, line 6–10, appellee's brief, it states:

> "None of them (appellant's directors) except Rosene and French had ever been to Alaska and of course had not seen any of the mining property, and never in fact undertook to place any valuation upon the property (Record, p. 132)."

The record shows that French furnished Rosene certain written reports of mining experts on the properties, which report showed $50,000,000 in gold in the mining ground (Record, p. 152); that Rosene informed himself as to and was satisfied with the competency and reliability of the experts (Record, pp. 138, 152); that Rosene believed their statements as to values (Record, p. 152), and that the board of directors on March 20, 1906, voted that in their judgment $3,995,000 was a fair and reasonable value of the properties (Min. of Appellant's Board Meeting March 20, 1906, Ex. D1, Record, p. 43).

The statutes of Maine provide that the judgment of the directors as to the value of the property purchased where stock is issued for the same, in the absence of actual fraud, shall be conclusive (Record, p. 28).

It was not necessary for the directors to person-

ally view the properties before forming a judgment as to values; and unless they were mining experts themselves, a personal survey on their part would not have helped them form a judgment as to values. They not only had a right, but it was the practical, common sense thing to do, to rely upon the opinion of experts, as to whose character, competency and reliability they were satisfied. That thing they did.

6. At page 8, lines 11, 13, appellee's brief, it states that the subscription was the only business transacted at the April, 1906, meeting of appellee's board when the alleged repudiation took place. Appellee's witness, Hartman, testifies that he thought there were other matters transpiring at that meeting at that time (Record, p. 84, lines 6, 7).

7. At page 9, lines 5, 8, appellee's brief, it states:

> "And in July (appellant) was largely indebted to appellee, either upon account of freights or upon advances made by Rosene on behalf of appellee to appellant. In this condition of accounts" Rosene, without the knowledge of the board, instructed M. M. Perl, its auditor, to credit appellant $25,000 on the subscription.

Appellee's witness, Trenholme, admits that, on July 15, 1906, appellant had a credit with appellee on the latter's books of $75,000 (Record, p. 114, line 22, 23).

8. At page 9, lines 15 to 24, appellee's brief, it states that appellant's representatives in Alaska, through permission of Rosene as its managing director, drew on him or appellee, at Seattle, for large

sums of money from time to time as they were needed, and auditor Perl, under private instructions from Rosene, would pay these drafts out of appellee's funds and charge them to appellant's account. Such a statement is so gross in inaccuracy and so wide of fact as disclosed by the record, that it is difficult to understand why appellee makes it. The method of keeping appellant in funds in Alaska and the handling of appellant's drafts drawn at Nome on Seattle, in Seattle, are fully explained by appellee's witness Trenholme, who, in describing the relations between the two companies at Seattle, characterizes the appellee as the "clearing-house" for appellant. (Record, pp. 108, 118.) The statement in appellee's brief that these drafts were paid by auditor Perl under private instructions from Rosene, thereby intimating that the transactions were tainted with irregularity, is not even suggested at any place in the record. The only "private instructions" to Perl from Rosene were in reference to the $25,000 credit of July 15, 1906 (Defendant's Exhibit No. 1, Record, p. 68), and this item had no relation to any draft whatever. Trenholme testifies that all drafts of appellant originated at Nome, were paid by appellee at Seattle, and that appellee in every case covered itself by drawing drafts for similar amounts on appellant at New York and taking credit for the amounts thereof in its Seattle bank. (Record, pp. 108, 114.)

9. At pages 9, lines 24–28 and 10, lines 1–4, appellee's brief, it states that on August 31, 1906, appellant was indebted to appellee in a sum of something

over $57,000 (in addition to $75,000 theretofore paid on the subscription), and that on September 5, 1906, this was the condition of the accounts. Again appellee's witness, Trenholme, contradicts appellee. Trenholme, on cross-examination, reluctantly admits that on September 5, 1906, the "condition of the accounts" was that appellant was indebted to appellee in the sum of $17,692.00. (Record, pp. 118, 119.)

10. At pages 10, lines 26–28, and 11, lines 1–9, appellee's brief, it states that Rosene early in October, 1906, reported to appellant's board at New York that he had forced appellee's board of directors to agree to subscribe for the $125,000 of stock to be paid for by the application of moneys "as above set out" (that is, by the application of $125,000 indebtedness of appellant to appellee on the "new subscription," appellee's brief, p. 10), and appellee was authorizing this new subscription as a full settlement and disposition of the whole matter.

Again, the record fails to show any such evidence.

Rosene, as appellee's witness, at pages 134, 135, 165, 167 and 168 of Record, testifies as to the New York conference between himself and appellant's directors as individuals, but nothing there is found to sustain appellee's statement above as to the application of the moneys.

Appellee admits in brief, page 11, that this meeting of appellant's directors in New York in October, 1906, was not a "formal directors' meeting," but would have it implied as a directors' meeting, because the conference "took place in the directors' room of appellant" in the office of A. A. Hausman

& Co., and because all the directors but one were present and assented, notwithstanding the testimony of Rosene, as appellant's witness, that the meeting was not a board meeting (Record, p. 165), and notwithstanding his further qualification that "Pierce (one of appellant's directors) understood it if he was not present, he understood it within a very short time." (Record, p. 176.)

At page 26, lines 27, 28, of its brief, appellee has invoked the rule in its own behalf that "the board could act only when in session as a board." We invoke the same rule.

11. On page 12, lines 25–28, appellee's brief, it states that E. J. Mathews, president of appellant in the year 1908, testified "that when he became president he was informed or knew that the appellee *had*, or claimed that it had repudiated the Rosene subscription (page 76)."

The record at page 76 is: "Never considered that defendant had repudiated it before he had any connection with plaintiff; knew that defendant claimed they had repudiated it."

Appellee contends that the verdict of the jury "settles the questions of fact in favor of appellee. No exception was made by the appellant to these instructions. It claimed that it requested Special Instruction No. 16, which was in part inconsistent with the general charge. The requested instruction is not brought up by the record and, therefore, its correctness cannot be considered." (Brief, p. 13.) The requested instruction is found in the record

under the certificate of the clerk of the trial court at page 194.

Furthermore, the verdict of the jury does not settle any questions of fact in this case, unless according to law and justice; as this court, under the Act of March 3, 1915, Chapter 90, 38 Statutes at Large, 956, has power to render judgment upon the record as law and justice shall require.

ARGUMENTS.

Appellant in its Specifications of Error (brief 29–35) departed from the order of its Assignment of Errors as filed at the time of taking this appeal (Record, p. 197), and by omitting in the Specification the first, fourth, and fifth assignment of errors, waived those assignments.

In replying to appellee's argument, we will discuss these points in the order in which they are there arranged:

I.

The first assignment of error (Record, p. 197) is not included in the Specifications of Error asserted and intended to be urged, and is therefore waived.

II.

Delivery of Stock.

Appellee cites Delaware County vs. Safe Co., 133 U. S. 473, in support of the rejection of the stipulation offered in evidence by appellant. (Record, p. 69.)

The pleading in that case was not a former complaint in the action, as appellee states in his brief, p. 16, but was the complaint in an action brought by

the plaintiff therein against its assignors. And of the cases cited in Delaware County vs. Safe Co., *supra,* in the case of Combs vs. Hodge, 21 Howard, 397, the parties to the suit, a pleading of which was relied upon as evidence, were different from the parties to the suit in which it was sought to be introduced as evidence; and in the case of Pope vs. Allis, 115 U. S. 363, there was introduced in evidence a deposition, to which, as an exhibit, was attached a copy of the complaint between the plaintiff in Pope vs. Allis and a stranger, relating to the same subject matter which the court held was competent evidence. It appears the complaint thus introduced was sworn to, but there is no consideration by the court of the admissibility of a statement not under oath.

In Murray vs. Chase, 134 Mass. 92, cited by appellee, the evidence offered and rejected was an affidavit for a continuance by an attorney; and in the case of Dennie vs. Williams, 135 Mass. 28, the evidence was an answer in a formal suit against only one of the defendants in the suit where the pleading was offered as evidence.

It is true as appellee states, brief, p. 17, that with the offer of the stipulation in question there was no offer of any evidence to show that the client had any knowledge that the stipulation was ever entered into by its attorneys, but, in our opinion, the burden is on the appellee to show that the admission and the stipulation were, in fact, erroneous by inadvertence or otherwise. The stipulation was within the professional function of the attorney, and binds the client in the case where it is filed. It was a matter

of waiving proof of an allegation of the amended complaint, the truth of which was easy of ascertainment by the attorney so stipulating.

Chamberlain's Modern Law of Evidence, sec. 1262.

But it is not material whether there was any evidence that the matters contained in the stipulation were ever actually embodied in any formal pleading (brief, p. 17), because under the terms of the fourth paragraph of the stipulation "the second amended answer as *thus* amended *shall be considered and stand* as defendant's answer to said amended complaint as so amended." It is clear that it was never the intention of the parties even that the answer so amended should be amended by interlineations.

We submit the stipulation was competent and should be considered by this Court in review on appeal as part of the record evidence.

Arguing against its materiality, appellee states as premises:

(1) That the $125,000 stock authorized by the resolution of September 5, 1906, was paid for by applying the $75,000 credited appellant prior to that date and by an additional credit made on September 5, 1906 (brief, p. 18). No such credit was shown —the additional credit or credits on account of appellant's stock were, September 6, 1906, $25,000, and September 15, 1906, $25,000; (2) that the stock of plaintiff received by defendant represented stock which had been paid for by the $125,000 Rosene had paid out of defendant's funds. There was only

$75,000 paid by Rosene out of defendant's funds; the balance was authorized by appellee's board.

Appellee argues that the testimony shows conclusively that the admission of defendant's attorney in the stipulation was inadvertent and not true in fact (brief, p. 19). No offer was made by appellee at the trial to show any inadvertence, and the record fails to show conclusively, or otherwise, that the admissions of the stipulation were not true in fact.

Appellee argues that Hartman in admitting in his letter (Defendant's Ex. 3) that the subscription of stock authorized had been fully paid "as evidenced by the certificate of capital stock now held by the Northwestern Commercial Co.," was apparently in error. The letter speaks for itself. The appellee produced it. Hartman, as appellee's witness, identified it, and was interrogated as to it (Record, p. 82), and did not attempt to claim any incorrect recitals therein.

The evidence, including the stipulation, overcomes the presumption of the assignment of stock to appellee on the day of its dating, September 24, 1907; and the evidence, including the Rosene letter of April 18, 1906, with its marginal notes ("Exhibit N"), addressed to appellant's secretary, asking for the stock under payments made by appellee on the subscription, tend to show at least that the stock was demanded as payments were made on the subscription.

And if demand was made for stock upon payment, is it not fair to presume that the demand was complied with, in accordance with the terms of the sub-

scription agreement that upon payment full paid shares should be delivered therefor?

The marginal notes on Rosene's letter of April 18, 1916 (Ex. "N"), are all that survive Henderson—he is dead and could not be called to show when he complied with the demand of that letter.

If the stipulation taken in connection with Rosene's letter to Henderson of April 18, 1906 (Ex. "N"), has any probative force tending to show a delivery to and acceptance of appellant's stock by appellee, from time to time, as payments were made on the subscription, then the rejection of that stipulation was prejudicial to appellant for the reason that if appellee accepted stock under the subscription as payments were made under it in April and July, 1906, that fact would have a direct bearing on appellee's alleged repudiation of April, 1906, if there were such a repudiation.

III.

The record shows that the minutes of appellee's Executive Committee's meeting of October 23, 1907, were identified by appellee's secretary and read in evidence and afterwards stricken by order of Court. Those minutes are part of the *supplemental record,* consisting of the exhibits, and are easy of identification.

The only bearing this evidence could have would be to show the continued relations between appellee and Rosene, in connection with appellee's contention that Rosene had misappropriated so large a sum of appellee's money as $75,000.

If, because the minutes of this meeting were not

marked and thus identified, after being read in evidence, they are not now available, though present, then appellant must confess the second specification of error (third assignment of error).

IV.

The fourth assignment of error is not included in the specifications of error intended to be urged, and is therefore waived.

V.

The fifth assignment of error is not included in the specifications of error intended to be urged and is therefore waived.

VI.

The Third Specification of Error.

Trenholme, witness for appellee, was asked: Did the board of trustees at any time ratify any subscription, etc.?

This obviously called for the conclusion of the witness; appellee admits as much when it states:

"There might be a course of conduct on the part of the appellee in its business dealings and transactions with the appellant which would be held to be an acquiescence or ratification of the subscription and be binding as such upon the appellee" (brief, 26, lines 4, 9).

It does not follow, as appellee argues (brief, 27), that any action by the board would be a positive action, either ratifying or repudiating the subscription. A course of conduct of appellee which would be held in law an acquiescence or ratification, might have been on the part of appellee's board of trustees

as of any of its other officers or agents; it could only act vicariously.

VII.

Notice of Repudiation to Appellant.

Appellee argues that the objection of appellant to the question put to Trenholme, whether he informed the president of appellant of the action of appellee's Board of Trustees' meeting of April, 1906, in repudiation, on the ground of incompetency, was not well taken, and that the objection should have been on the ground of its materiality.

Appellee was attempting to prove notice of the repudiation,—whether or not legal notice was given was a very material point in the case. The materiality of legal notice could not be questioned, but whether a certain statement of facts was sufficient to show notice depended upon whether competent evidence was offered, that is, relevant, fit and appropriate; not that the witness Trenholme was incompetent to state facts, but that the facts stated or sought to be adduced were not competent to prove the notice required by law.

Appellee further argues that because a large part of appellant's business, consisting of the purchase and shipment of goods to Alaska, was transacted at Seattle, and because appellant's president was present in Seattle for some little time in the spring of 1906, therefore he was presumably in Seattle on the business of his company; that there was nothing in the record indicating that he was in Seattle on other business. But it overlooks the fact that by resolution of appellant's Board of Directors of March 21,

1906, Rosene was appointed managing director with full power and authority to take charge of the operation of appellant company (Minutes of appellant's Board, March 21, 1906, Exhibit D-2, Record, p. 43). This would preclude any presumption that the president of that company was here on the company's business. It had a managing director on the ground, with full power and authority in the matter of its operations, and that was at least *prima facie* evidence that the president had no business here connected with the company, at least with its operations. If there was any other business of appellant here at that time in which the president could have been engaged, it does not appear in the record, nor was it necessary to show that the president was not here on other business. He had a right to be here as a traveler in transit. We submit that he was entirely disassociated with the company's business while at Seattle, 3,500 miles from New York, where the appellant had its principal office outside the State of Maine, and where its board held its meetings, and, therefore, notice to the president at Seattle as testified to by Trenholme was not notice to the appellant.

VIII.

Instruction No. 16.

This instruction is properly of record as an "excerpt from plaintiff's request for instructions" filed with the Clerk of the court below, December 1, 1915, and is found on pages 194, 195 of the Record.

Though called for in appellant's praecipe for record on appeal served on appellee and included in

the record, appellee has evidently overlooked it.

IX.

Assignments of Errors 9 to 17, inclusive, being Specifications of Error 6 to 14, inclusive, are urged, under Act of Congress of March 3, 1915, Ch. 90, 38 St. L. 956, which provides that in cases where an equitable defense has been interposed, on review the appellate court shall have power to render such judgment upon the record as law and justice shall require.

The case of Dunsmuir v. Scott, 217 Fed. 200, cited by appellee, has no application here as that was an action at law.

We seek a review and judgment on the law and facts as disclosed by the record.

X.

We are content to rest the validity of the issuance of appellant's common stock on the record and the cases cited by appellant in its opening brief (under Point "Bonus Stock," p. 94).

The amended complaint alleges the issuance of the stock strictly within the provisions of the statutes of Maine, to wit, that the mining properties purchased and paid for by the issue of that stock were, in the judgment of appellant's directors, necessary for its business and the purchase price, $3,995,000, in the honest and *bona fide* judgment of appellant's directors, the fair and reasonable value thereof (Par. IV of Am. Complaint, Record, pp. 17, 18).

Appellant, as appellee would have it appear (br. 36), is not now contending that the issuance of the stock to Rosene was under the facts as alleged in the fifth affirmative defense, and amounted to a payment

for the stock irrespective of the question of good faith of the directors in the valuation of the property.

A recital of the proofs in the record in support of the allegations of the amended complaint are found in appellant's opening brief, at pages 1 to 14, inclusive. The judgment of appellant's directors as set out in the record was not impeached for fraud, actual or constructive, by appellee on the trial. An attempt was made by appellee to show by its witness Rosene that he objected to the arrangement for the issuance of the common stock (Record, page 131), but on cross-examination he admitted that he acquiesced in the method of procedure concerning the issuance of this stock to him for the mining properties, that is, the three and three-quarter million of common stock, that it was agreeable to him, and it was certainly agreeable to the rest. (Record, p. 148, lines 18, 24.)

Any objections by Rosene at that time were merged in the Agreement and Supplemental Agreement of Rosene entered into pursuant to authority of appellant's board of March 20, 1906.

There was no attempt on appellee's part to show that in the issuance of the common shares there was fraud, either actual or constructive, except so far as that issue might be a constructive fraud on subsequent subscribers.

But when all the directors and stockholders, at the time of such issuance, all concur, there can be no constructive fraud to future subscribers, then or relating back, *nunc pro tunc,* upon such future subscription

taking place. (See Old Dominion Copper M. & S. Co. Case, 210 U. S. 28.)

XI.

The questions of ratification and estoppel in appellant's opening brief (p. 108), are urged under the new procedure under Act of Congress of March 3, 1915, above referred to.

In seeking by this appeal, a review and judgment on the law and facts as disclosed by the record, it is proper to urge all questions arising on that record, questions both of law and fact. That we have attempted to do.

XII.

Appellee raises the question that in all subscriptions to capital stock it is an implied condition that it shall not be binding until all of the capital stock has been subscribed; that the full amount of appellant's capital stock has never been subscribed, and therefore the subscription in suit is not binding on appellee (br. p. 30); and states that the court below in its ruling settling the pleadings held that the rule contended for did not apply to Maine corporations (br. 42).

Appellant's contention is that the rule as contended for by appellee does not apply to a subscription containing an unconditional promise to pay and that the subscription in suit contains an unconditional promise to pay.

We reply to appellee's contention and statement by adopting as our own and submitting the language of the court below in the ruling on this question referred to on page 42 of appellee's brief:

"It is contended by the defendant that its subscription was upon the implied condition that the entire amount of the capital should be subscribed, and hence that the defense set up should prevail against demurrer. This contention necessitates a construction of the subscription contract with special reference to the laws of Maine, the state in which the plaintiff corporation was created.

Glenn v. Liggett, 135 U. S. 533.

The doctrine of the Maine cases seems to be that a bare subscription to the stock of a corporation is subject to the implied condition that the entire capital stock of the corporation shall be subscribed before the liability of the subscriber to pay therefor arises; but that where an unconditional promise to pay is made, it is not necessary that the entire capital stock should be subscribed before the subscriber can be held.

Penobscot R. R. Co. v. Dummer, 40 Me. 172, 63 Am. Dec. 654;

Penobscot R. R. Co. v. White, 41 Me. 512, 66 Am. Dec. 257;

Old Town & Lincoln R. R. Co. v. Veazie, 39 Me. 571;

Somerset & Kennebec R. R. Co. v. Cushing, 45 Me. 524;

Rockland Mt. etc. Co. v. Sewall, 3 Atl. 181 (Me.);

Id., 14 Atl. 939;

Kennebec etc. R. R. Co. v. Jarvis, 34 Me. 360;

Skowhegan & A. R. R. Co. v. Kinsman, 77 Me. 370.

These holdings are based upon the principle that when a subscription is made without an express promise to pay, the promise to pay is implied by law, and is subject to all the conditions which the law considers must have been contemplated by the parties in making the subscription. Likewise when the promise is to pay legal assessments, it is considered that the parties contemplated the performance of all of the usual conditions to the levying of assessments before liability should attach.

Somerset & Kennebec R. R. Co. v. Cushing, *supra;*

Oldtown & Lincoln R. R. Co. v. Veazie, *supra.*

The condition that the entire capital stock should be subscribed before the subscriber should be held liable is but an implied provision of the contract of subscription, which the law considers must have been the intention of the parties, in the absence of expressions to the contrary. There is nothing to prevent a subscriber from agreeing to pay his subscription, even though the entire capital stock of the corporation be not subscribed.

Skowhegan & Athens R. R. Co. v. Kinsman, *supra.*

Where it appears from a reading of the subscription agreement that such was the intention of the parties the Court should enforce the contract which the parties have made, and not undertake to make another for them.

The contract here in question leaves no room for inserting therein an implied provision that the capital stock of the corporation should be first subscribed before liability should arise. The subscriber promised to pay 20% of his subscription on signing. This certainly negatives an intention as to that portion of his subscription, at least, that his promise was conditioned upon the entire capital stock being subscribed. He then promises to pay 10% of the subscription on July 15, 1906. There is no room for any construction as to this amount; the liability arose when the day came. The party then promised to pay the residue as called for by the directors upon 30 days' notice, the only condition being that not over 50% of the subscription should be payable during the year 1906. If this last promise stood alone, there might be some ground for contending that the parties intended that no calls should be made by the directors until all of the stock had been subscribed; but the contract must be considered as a whole in ascertaining the meaning of a part thereof. Having made an unconditional promise to pay 30% of his subscription, a part of which was paid in cash, the subscriber can hardly contend that his promise to pay the residue upon calls was based upon the implied condition that the entire capital stock should first be subscribed. Such a condition would go to the question of whether or not he wished to embark on the enterprise,—whether he wished to be liable at

all,—and if he waived such condition as to a part of his subscription, he cannot claim that he intended to preserve it as to another part, without an express stipulation to that effect. The court will not, under the guise of effectuating the intention of the parties, read into this contract a provision which the parties have by their own words shown was not intended.

All of the Maine cases cited are in harmony with the conclusions here reached. In Penobscot R. R. Co. v. Dummer, *supra*, there is no mention of any express promise to pay, and it does not appear but that the action was upon the promise implied by law from the fact of subscription. The same may be said of Penobscot R. R. Co. v. White, *supra*. In Old Town & Lincoln R. R. Co. v. Veazie, *supra*, the promise was to pay 'legal assessments.' In Somerset & Kennebec R. R. Co. v. Cushing, *supra*, the by-laws provided for a capital stock of 7,000 shares, and the promise was to 'pay to the treasurer of said company all assessments that shall be made on said shares, in pursuance of the by-laws and charter of said company.' In Rockland Mt. etc. Co. v. Sewall, *supra*, it was agreed that the capital stock of the corporation should be $40,000, divided into shares of $100 each, and the promise was that the "parties to the agreement shall contribute toward the capital stock such sums as they may severally place against their names.' In the absence of an expression of

the parties, the law implied that this promise was upon the usual condition that all of the $40,000 should be subscribed before liability attached. The later report of the case in 14 Atl. 939, necessarily involved the same contract.

The fact that this is an action upon an assessment cannot vary the principles above stated. The liability to pay the subscription having attached, the assessment and notice thereof was but a formal demand for payment."

In the case of Showhegan & Atkins R. R. Co. v. Knisman, 77 Me. 370, the subscription read:

"We, the undersigned, hereby agree to take and hereby subscribe for the number of shares of stock in said railroad company hereunto by each of us placed opposite our names in the following list, said shares to be fifty dollars each. And we agree to pay the par value of the same. And all who shall subscribe for as many shares in the following subscription as they have subscribed for in the former lists, are hereby released from all former subscriptions to said Company."

Suit was brought on that subscription and the defense was that the minimum number of shares named in the charter were not subscribed for. The Court said:

"A person by simply subscribing for shares in a corporation without words of promise to pay assumes obligations imposed by law on such subscriber. He is understood to have agreed to

assume a certain percentage of the responsibility of the enterprise on condition that the amount of the responsibility be made certain and the remaining percentage be assumed by responsible parties. He can require that the full amount of the capital stock agreed upon or established by the charter as necessary for success shall be engaged before he pays in his part. He is only obliged to pay legal assessments and where the capital stock has not been fixed or when fixed has not been subscribed for, there can be no legal assesssment unless the charter otherwise provide. Som. & K. Co. v. Cuching, 45 Me. 524; Somerset R. Co. v. Clarke, 61 Me. 379.

But a person may in his subscription voluntarily assume any other obligation not forbidden by law. He may waive any and all of the conditions implied by law in a naked subscription. He may impose other conditions, or he may promise payment for his shares without any condition. His promise, once made, will be binding, there being in such cases sufficient consideration in the obligation of the company to deliver the shares. K. & P. R. R. Co. v. Jarvis, 34 Me. 360; Bucksport & B. R. R. Co. v. Buck, 65 Me. 537; City Hotel v. Dickinson, 6 Gray, 586; Lexington & W. Cam. R. R. Co. v. Chandler, 13 Met. 311; Pen. & K. R. R. Co. v. Bartlett, 12 Gray, 244; Boston B. & G. R. R. Co. v. Wellington, 113 Mass. 79.

In such cases the express promise is to be enforced by an action thereon, and not by an action on a promise implied by law only. * * *

The defendant claims he is not liable to pay for the shares he thus subscribed for, because the amount of the capital stock was not fixed and the minimum number of shares in the charter were not subscribed for. He might not be liable to pay in such case, if he were a mere subscriber for stock or if this action were for legal assessments; but he in addition to his subscription for shares expressly promised to pay $50 each for them and this action is on his express promise to pay and not on any promise merely implied by law.

His promise was unconditional and he cannot invoke new conditions. In Ken. & P. R. R. Co. v. Jarvis, 34 Me. 360, above cited the capital stock was fixed by the directors at 12,000 shares with right of increase to 20,000 shares. The shares subscribed for were never so many as 12,000, and the defendant invoked that omission in defense. The court expressly overruled that defense and held his liability on the ground he had expressly promised to pay (not legal assessments, but) 'at such times, to such persons and in such installments as shall be hereafter required by a vote of said company.' The case is decisive of this. In the cases cited by the defendant it will be found there was no express promise to pay, or only a promise to pay legal assessments or that the action was only on an

implied promise as for legal assessments. In such cases the conditions implied by law must be shown to have been fulfilled. In this case those conditions were waived by the express promise to pay absolutely."

We submit that appellee is liable on the subscription in suit, notwithstanding the fact that the full amount of appellant's capital stock has never been subscribed for.

Respectfully submitted,

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